No. 92-1550

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ABF FREIGHT SYSTEM, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE WOMEN'S LEGAL DEFENSE FUND AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE WOMEN'S LEGAL DEFENSE FUND AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") and the Women's Legal Defense Fund ("WLDF") respectfully submit this brief as *amici curiae*. The written consents of the parties are being filed with the Clerk of this Court simultaneously with this brief. This brief urges affirmance of the Tenth Circuit's decision in *Miera v. National Labor Relations Board*, 982 F.2d 441 (10th Cir. 1992), and thus supports the position of Respondent.

INTEREST OF THE *AMICI CURIAE*

The Lawyers' Committee is a nonprofit organization that was established at the request of the President of the United States in 1963, to involve leading members of the

bar throughout the country in the national effort to ensure civil rights to all Americans. It has represented, and assisted other lawyers in representing, numerous plaintiffs in administrative proceedings and lawsuits under Title VII in the lower courts. *See, e.g., Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561 (4th Cir. 1985); *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982); *Sledge v. J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). The Lawyers' Committee has also represented parties and participated as an *amicus* in Title VII cases before this Court. *See, e.g., Landgraf v. USI Film Products*, No. 92-757 (*cert. granted*, 61 U.S.L.W. 3580, Feb. 22, 1993); *St. Mary's Honor Center v. Hicks*, —— U.S. ——, 113 S.Ct. 2742 (1993); *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Hazlewood School District v. United States*, 433 U.S. 299 (1977); *Chandler v. Roudebush*, 425 U.S. 840 (1976).

The Women's Legal Defense Fund is a national advocacy organization that was founded in 1971 to advance the rights of women in the areas of work and family. The WLDF works to challenge gender discrimination in the workplace through litigation of significant sex discrimination cases, public education, and advocacy for improvements in the equal employment opportunity laws and their interpretation before Congress and the federal agencies charged with their enforcement. Throughout this work, the WLDF has placed special emphasis on equal employment opportunity for women of color, who often face job discrimination based on both race and gender. WLDF's participation as *amicus* in Title VII cases before this Court includes *United Auto Workers v. Johnson Controls*, —— U.S. ——, 111 S.Ct. 1196 (1991), *Hopkins v. Price Waterhouse*, 490 U.S. 228 (1989), *Johnson v. Transportation Agency of Santa Clara Cty.*, 480 U.S. 616 (1987), *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), and *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

The question presented in this case is whether an employee who was unlawfully discharged under the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, must be denied the remedies of reinstatement and backpay if the administrative law judge concludes that any portion of the employee's testimony at the hearing into the employer's unlawful conduct was "purposefully" untrue. The resolution of that question turns primarily on the principles governing the National Labor Relations Board's broad discretion to remedy unfair labor practices under the NLRA.

Petitioner mistakenly argues, however, that Title VII principles support the adoption of a *per se* rule that unlawfully discharged employees nonetheless forfeit their right to reinstatement and backpay if they are subsequently found to have given false testimony of any kind at the hearing into their employer's unlawful conduct. Petitioner relies specifically on lower court decisions holding that certain "after acquired" evidence of an employee's misrepresentations or misconduct during the employment relationship may disqualify the employee from reinstatement, and limit or bar an award of backpay.

The decision in this case may therefore have implications for the availability of reinstatement or backpay to employees who are the victims of unlawful employment practices under other federal statutes, including Title VII, the Equal Pay Act, and other antidiscrimination statutes. The Lawyers' Committee and the WLDF have an interest in the adoption of legal principles that will result in the sound administration of federal antidiscrimination laws. As the *amici* argue in this brief, a bright line "after acquired evidence" rule as suggested by Petitioner is inconsistent with the remedial purposes of Title VII and analogous statutes, and with the Court's prior decisions.

STATEMENT

1. Michael Manso was employed as a casual dockworker in Petitioner's Albuquerque truck terminal. *ABF Freight System, Inc.*, 304 N.L.R.B. 585, 585 (1991). Effective May 29, 1988, a new collective bargaining agreement between Petitioner and the Teamsters provided casual dockworkers with certain preferential employment rights. *Id.* A dispute soon arose concerning the effect of the new agreement, with Petitioner taking the position that Manso and certain other casuals did not qualify for preference and could be discharged. *Id.* at 586. Petitioner terminated Manso and eleven other casual dockworkers on June 20, 1988. *Id.* at 586-87.

The union filed a grievance on behalf of the terminated workers. *Id.* at 587. In addition, on November 21, 1988, as the dispute proceeded through the grievance procedure, Manso and another worker filed an unfair labor practice charge. *Id.* at 589. On April 6, 1989, at the final step of the grievance process, the grievance committee ordered the terminated employees reinstated without backpay. *Id.* at 587. Manso returned to work on April 24, 1989. *Id.* at 589.

2. Upon his return to work, three of Manso's supervisors told him that Petitioner was out to get him for having filed the grievance and the unfair labor practice charge. The threats proved to be true; Manso was terminated twice over the next four months. Manso's first termination arose out of Petitioner's practice of verifying calls to work made to preferential casuals. Under this new policy—applicable only to preferential casuals like Manso—a supervisor in need of a preferential casual to work the next shift would have a union member telephone the casual. *Id.* at 597. If the casual did not answer, the union member would be asked to sign a written verification that the call had been made and that there had been

no response. *Id.* Two such failures to respond permitted the termination of a preferential casual. *Id.*

On May 8, 1989, Manso received a warning letter for failing to respond to a call to work made on May 6. *Id.* On June 19, Supervisor Ronald Ford asked union member Jeff Motter to verify a telephone call to Manso to come to work. *Id.* When Manso did not respond to the call, Motter told Ford that he feared he had misdialed Manso's telephone number, and asked to make the call again. *Id.* Ford refused Motter's request. *Id.* Manso was discharged for failing to respond to the June 19 call to work. *Id.* Manso grieved the discharge and was reinstated without backpay at the first level of the grievance procedure. *Id.* at 589.

On August 11, 1989, Manso arrived four minutes late to begin work on the 5:00 a.m. shift and was issued a warning letter. *Id.* At this time, Petitioner had no policy regarding tardy preferential casual dockworkers. *Id.* at 591. Six days later, Manso arrived nearly one hour late for the 5:00 a.m. shift. *Id.* at 589. Manso explained that his car had broken down on the way to work and that he had called his wife to come pick him up on the highway. *Id.* at 597. Manso further explained that, with his wife in the car, he drove to work and was stopped by a Deputy Sheriff for speeding. *Id.* Petitioner determined that Manso fabricated this story, and terminated Manso under a newly-instituted policy applicable only to preferential casuals permitting termination for two unexcused absences. *Id.* at 589. Manso grieved the discharge, but lost at the first step and took the grievance no further. *Id.* at 597. Manso then filed a second unfair labor practice charge.

3. The two unfair labor practice charges against Petitioner were consolidated for hearing. J.A. 4.[1] With re-

[1] The Joint Appendix filed with the Brief for Petitioners is cited as "J.A. ——." The Board, disagreeing with the administrative

spect to the second charge, the Board, agreeing with the administrative law judge, concluded that Petitioner unlawfully discharged Manso in June 1989 in retaliation for Manso's filing of the grievance and unfair labor practice charge. Disagreeing with the administrative law judge, the Board concluded that the discharge in August 1989 was also unlawful. The Board ordered Manso reinstated with backpay.

a. In concluding that Manso had been unlawfully discharged in both June and August 1989, the Board adopted the administrative law judge's findings on credibility. *Id.* at 585. In particualr, Manso testified that, upon his return to work in April 1989, three of his supervisors made threatening statements: Supervisor Lovato told Manso to "watch [his] . . . step [because] ABF was gunning" for him (J.A. 96); Supervisor McNutt told Manso "to be careful because the higher echelon was after" him (J.A. 97); and Supervisor Beeson told Manso, "Let's see how long it takes them to get rid of you this time." (J.A. 99). Although each of these supervisors unequivocally denied making these statements to Manso, (J.A. 91 (Lovato), 118 (McNutt), 56 (Beeson)), the judge found Manso's statements to be truthful. *ABF Freight System, Inc.*, 304 N.L.R.B. at 597.

In addition, union member Motter testified that he told Supervisor Ford he may have misdialed Manso's number on the morning of June 19, and that his request to redial Manso's telephone number was refused by Ford. J.A. 122. Supervisor Ford flatly denied that Motter said he feared he had misdialed Manso's number or asked to redial the number. J.A. 64. The administrative law judge

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law judge, found that the initial discharge of Manso and the other casuals in June 1988 did not violate the NLRA because it had been based on Petitioner's reasonable interpretation of the collective bargaining agreement. *ABF Freight System, Inc.*, 304 N.L.R.B. at 585.

found Motter to be telling the truth. *ABF Freight System, Inc.*, 304 N.L.R.B. at 597.

Finally, at the hearing Manso repeated his explanation for his tardiness on August 17. J.A. 104-07. The Deputy Sheriff who stopped Manso for speeding, however, testified that Manso was alone when stopped. *Id.* at 126-27. The administrative law judge found Manso's explanation for his tardiness to be untrue. *ABF Freight System, Inc.*, 304 N.L.R.B. at 600.

b. Although the administrative law judge found it "apparent . . . that the [Petitioner] . . . harbored animus against Manso for engaging in protected activities," the judge found that Manso was lawfully terminated for cause in August 1989 because he had been dishonest about the reason for his tardiness on the morning of August 17. *Id.* The Board, however, found the judge's conclusion that Manso had been fired for dishonesty to be based upon a "plainly erroneous factual statement of the . . . asserted reasons" for the discharge. *Id.* at 590.

In the Board's view, the testimony of Petitioner's own witnesses established that Manso was assertedly fired because of his second unexcused tardiness, not dishonesty. *Id.* Moreover, the Board found further that Petitioner's treatment of Manso under the newly instituted lateness policy was not consistent with its previous treatment of other casual workers, and was pretextual. *Id.* at 590-91. The Board concluded that a *prima facie* case of unlawful discrimination had been made, and that Petitioner failed to show that it would have fired Manso even if he had not been engaged in protected activities. *Id.* at 591.

4. The court of appeals, affirming the Board, found "abundant evidence" in the record of "antiunion animus in ABF's conduct towards Manso." *Miera v. National Labor Relations Board*, 982 F.2d 441, 446 (10th Cir. 1992). The court further found that substantial evidence supported the Board's determination that Manso was not

discharged for cause, but instead had been the victim of an unlawful discriminatory discharge. *Id.* Finally, the court of appeals found that the Board had not abused its "considerable discretion" by awarding backpay and reinstatement to Manso, even though Manso had repeated his false explanation for being late to the administrative law judge. *Id.* at 447. As the court observed, Manso's "misrepresentation was made to his employer in an attempt to avoid being fired under a policy the application of which the Board found to be the result of antiunion animus." *Id.*

SUMMARY OF ARGUMENT

Petitioner asserts that Title VII jurisprudence supports the adoption of a "bright line test" prohibiting the Board from awarding reinstatement and backpay to the victim of an unfair labor practice who testifies falsely in Board proceedings. *See* Pet. Brf. 30.[2] This Court's Title VII jurisprudence does not support the creation of the bright-line rule Petitioner requests. Title VII clearly places the award of injunctive relief and backpay within the discretion of the trial court. Under *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), and *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976), this discretion must be exercised consistent with Title VII's twin objectives of providing make whole relief to the victims of discrimination and of providing employers with incentives voluntarily to examine and correct discriminatory practices.

Petitioner argues that a so-called "after-acquired evidence rule" limits the trial court's discretion to fashion make whole relief for the victims of unlawful discrimination. In fact, there is serious disagreement among the lower courts as to the effect, if any, to be given to after-acquired evidence of employee misconduct unrelated to the challenged employment decision. In any event, none

[2] The Brief for Petitioner is cited as "Pet. Brf. ——."

of the lower court decisions cited by Petitioner supports a rule barring make whole relief as a sanction for statements made in the course of an adjudicatory proceeding.

This Court has recently held that Title VII does not serve to punish employer misrepresentations to a trial court. *St. Mary's Honor Center v. Hicks*, —— U.S. ——, 113 S.Ct. 2742 (1993). By the same token Title VII should not be transformed into a statute punishing employee misconduct. To the extent that Title VII jurisprudence is applicable in the NLRA context, it supports the continued exercise of the Board's discretion in light of the purposes of the NLRA, not the establishment of a bright line rule punishing the victims of anti-union animus.

ARGUMENT

TITLE VII AND ITS JURISPRUDENCE DO NOT SUPPORT THE ADOPTION OF A BRIGHT LINE RULE DENYING MAKE WHOLE RELIEF TO CHARGING PARTIES WHOSE TESTIMONY IS DISCREDITED IN BOARD PROCEEDINGS

I. TITLE VII REQUIRES THAT THE AWARD OF MAKE WHOLE RELIEF BE LEFT TO THE DISCRETION OF THE TRIAL COURT CONSISTENT WITH THE PURPOSES OF THE ACT

Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), governs the award of make-whole relief, including backpay and reinstatement, in Title VII cases. Section 706(g) provides in pertinent part that, upon finding a discriminatory employment practice, the trial court

> may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, . . . hiring of employees, with or without backpay, . . . or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g).

This Court has long emphasized that the text of Section 706(g) "implicitly recognizes" that the appropriate remedy may vary from case to case, and that fashioning the proper Title VII remedy lies in the first instance within the discretion of the trial court. *Albemarle Paper*, 422 U.S. at 415-16. The federal courts "are empowered to fashion such relief as the particular circumstances of a case may require" to remedy a Title VII violation. *Franks*, 424 U.S. at 764.

The trial court's discretion, however, is not unfettered. The fashioning of a remedy must be exercised " 'in light of the large objectives' " of Title VII. *Albemarle Paper*, 422 U.S. at 416, *quoting Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944). In particular, this Court has emphasized that the make whole remedies of Section 706(g)—including both back pay and reinstatement—

> should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.

Albemarle Paper, 422 U.S. at 421 (backpay); *Franks*, 424 U.S. at 771 (seniority).[3]

[3] Both *Albemarle Paper* and *Franks* relied on the legislative history accompanying the 1972 amendments to Section 706(g) as evidence that Congress had "strongly reaffirmed the 'make whole' purpose of Title VII." *Albemarle Paper*, 422 U.S. at 421; *Franks*, 424 U.S. 763-64. As the Section-by-Section Analysis of the 1972 amendments makes clear,

> relief [under Section 706(g)] is intended to make the victims of unlawful discrimination whole, and . . . attainment of this objective rests not only upon the elimination of the particular unlawful practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

118 Cong. Rec. 7168 (1972).

Despite this Court's admonition that the limits on Title VII remedies must be consistent with the aims of the statute, some courts have adopted various after-acquired evidence rules, or "after the fact" defenses, permitting an employer to defend against an employment discrimination claim on the basis of prior misconduct discovered *after* the employment action at issue. *See* Rubinstein, *The Use of Predischarge Misconduct Discovered After an Employee's Termination As a Defense in Employment Litigation*, XXIV Suffolk Univ. L. Rev. 1, 4 (1990). In *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), the Tenth Circuit found that evidence of employee misconduct discovered during litigation would deny a plaintiff any relief under Title VII and the Age Discrimination in Employment Act (ADEA). The court of appeals reasoned that this Court's decision in *Mt. Healthy City School District Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), supported the denial of relief under Title VII and the ADEA if the employer would legitimately have fired the plaintiff had it known of the misconduct. *See Summers*, 864 F.2d at 706-08. The Sixth Circuit has recently taken *Summers* to its logical conclusion and has announced that after-acquired evidence which, if known, would have justified termination demonstrates that the employee "suffered no legal damage" and provides an affirmative defense to a valid claim of illegal discrimination. *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302, 304-05 (6th Cir. 1992), *cert. granted*, —— U.S. ——, 113 S.Ct. 2991 (1993) (dismissed).[4]

This Court should reject Petitioner's contention that the after-acquired evidence cases properly limit a trial

[4] Petitioner also cites *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992), as supportive of its Title VII argument. *Johnson*, however, was brought under Michigan's Elliott-Larsen Civil Right Acts, decided on the basis of Michigan common law, and nowhere mentions Title VII. *See* 955 F.2d at 410, 412-13.

court's discretion in fashioning Title VII relief. Most basically, these cases contravene the purposes of Title VII because they insulate proven wrongdoers and bar proven victims from all remedy.

The affirmative defense[5] created by *Summers* and its progeny is "antithetical" to the objectives of Title VII. *Wallace v. Dunn Constr. Co.*, 968 F.2d 1174, 1180 (11th Cir. 1992). *See also Smith v. General Scanning, Inc.*, 876 F.2d 1315, 1319 (7th Cir. 1989) (rejecting argument that employee misrepresentation is relevant to ADEA liability of employer); Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 Tex. L. Rev. 17, 97 n.311 (1991) (affirmative defense contrary to Title VII's aims). As the *Wallace* court reasoned, providing an affirmative defense

> does not encourage employers to eliminate discrimination. Rather it invites employers to establish ludicrously low thresholds for 'legitimate' termination and to devote fewer resources to preventing discrimination because *Summers* gives them the option to escape all liability by rummaging through an unlawfully-discharged employee's background for flaws and then manufacturing a 'legitimate' reason for the discharge that fits the flaws in the employee's background.

Wallace, 968 F.2d at 1180.[6]

Indeed, *Summers* represents an "unwarranted extension" of *Mt. Healthy*. *Id.* at 1179. The *Wallace* court explained that *Mt. Healthy* excuses liability if an employer demonstrates that it would have taken the same employment decision, absent any discriminatory motive, based on the information it had in its possession at the time the decision was made. *Id., citing Mt. Healthy*, 429 U.S. at 285-86. The *Summers* affirmative defense, to the contrary,

> excuses all liability based on what *hypothetically* would have occurred absent the alleged discriminatory motive *assuming the employer had knowledge that it would not acquire until sometime during the litigation arising from the discharge.*

Wallace, 968 F.2d at 1179 (emphasis in original).[7]

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[5] There is considerable doubt that the federal courts have the authority to create an affirmative defense to a Title VII action in light of the comprehensive enforcement scheme created by Congress in the civil rights laws. As the Court has previously observed in the context of Title VII, *see Albemarle Paper*, 422 U.S. at 423 n.17 & 444 (refusing to enlarge Title VII's limited statutory good faith defense), and elsewhere, it is inappropriate for the federal courts to "invok[e] broad common law barriers to relief where a private suit serves important public purposes." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138 (1968) (reversing lower court's adoption of *in pari delicto* defense to private antitrust action).

[6] The *Wallace* court was also concerned that the creation of an affirmative defense would provide hiring officials with an opportunity to "sandbag" employees whom they intend to harass sexually:

> *Summers* encourages an employer with a proclivity for unlawful motives to hire a woman—despite knowledge of a legitimate reason that would normally cause the employer not to employ her—to destroy any evidence of such knowledge, to pay her less on the basis of her gender, to sexually harass her until she protests, to discharge her, and to "discover' the legitimate motive during the ensuing litigation, thus escaping any liability for the unlawful treatment of the erstwhile employee.

Wallace, 968 F.2d at 1180-81.

[7] Given that in these cases the after-acquired "legitimate" reason for discharge could not have motivated the employer's action, the *Summers* affirmative defense actually places the victim of discrimination in a worse position than those who are not members of a protected class. The affirmative defense thus contravenes "the *Mt. Healthy* principle . . . that the plaintiff should be left in no worse a position than if she had not been a member of a protected class." *Wallace*, 968 F.2d at 1179.

Rather than permitting information about which an employer was unaware (and which could not have supplied the basis for an employment decision) to insulate unlawful behavior, after-acquired evidence should properly be left to the remedy stage of a Title VII proceeding, where its effect is "best decided on a case-by-case basis." *Wallace*, 968 F.2d at 1181. While after-acquired evidence of serious misconduct may warrant a court's discretionary refusal to reinstate a victim of unlawful discrimination, after-acquired evidence should, as *Wallace* noted, have "no bearing on the availability *vel non* of a backpay award." *Id.* at 1182 n.12. A backpay award should not be prematurely terminated due to after-acquired evidence unless the employer can show that it would have discovered the after-acquired evidence before what would otherwise be the end of the backpay period absent its unlawful discrimination and any attendant litigation. *Id.* at 1182. Shortening the backpay period to the date of discovery of the after-acquired evidence—particularly if discovery occurs in anticipation of or during the discrimination litigation—places the plaintiff in a worse position than those outside a protected class and provides

> a windfall to employers who, in the absence of their unlawful act and the ensuing litigation, would never have discovered any after-acquired evidence.

Id.[8]

Even if the after-acquired evidence cases provided Petitioner with a limitation on the trial court's discretion consistent with the purposes of Title VII, Petitioner's effort to use these cases to support a bright line rule based on after-occurring misrepresentations suffers from at least two other substantial flaws.

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[8] In *Kristufek v. Hussmann Foodservice Co.*, 985 F.2d 364, 371 (7th Cir. 1993), the court limited backpay to the date the employer discovered during depositions that the plaintiff had inflated his educational background when he was hired, some five years before his termination. The employer in this instance gained the very windfall warned of in *Wallace*.

First, the lower court decisions on which Petitioner relies involve the later discovery of evidence of employee misconduct occurring prior to or during the employment relationship. Those cases do not have anything to do with employee misstatements made during the course of adjudicative proceedings that have been convened solely because of the employer's unlawful conduct. The conduct of witnesses at such a hearing, including a party, is simply irrelevant to the employment relationship or the employer's unlawful conduct, as we discuss in Part II below.

Second, even with respect to cases involving after-acquired evidence of employee misconduct during the employment relationship, the lower court cases generally require that a misrepresentation be material to the employment relationship: the employer must show that it would have, absent any discrimination, made the same employment decision had it known of the after-acquired evidence.[9] *See Summers*, 864 F.2d at 708; *Washington v. Lake Cty.*, 969 F.2d 250, 255 (7th Cir. 1992); *Milligan-Jensen*, 975 F.2d at 304-05. This critical aspect of the defense is a burden that Petitioner could not meet in this case.[10] The after-acquired evidence rules therefore do not

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[9] The materiality requirement "weakens the incentive for an employer to engage in a fishing expedition for 'minor, trivial or technical infractions'" for use against a plaintiff. *Washington*, 969 F.2d at 255-56, *quoting O'Driscoll v. Hercules, Inc.*, 745 F. Supp. 656, 659 (D. Utah 1990). Indeed, without a materiality requirement, the after-acquired evidence becomes merely another pretext for the employer's discriminatory action.

[10] Although Petitioner was aware of Manso's misrepresentation, the Board found that Manso was pretextually terminated for tardiness, not lying. *ABF Freight System, Inc.*, 304 N.L.R.B. at 590. The Tenth Circuit found the Board's determination to be supported by substantial evidence. *Miera*, 982 F.2d at 446. In light of the Tenth Circuit's application of the appropriate standard of review, this factual finding is not subject to further question. *See Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 491 (1951).

support the creation of a bright line rule based on misrepresentations which—as in this case—were irrelevant in the employment context.

II. PETITIONER'S REQUEST FOR A BRIGHT LINE RULE IS INCONSISTENT WITH THIS COURT'S DECISION IN *HICKS*

As noted above, none of the after-acquired evidence cases purport to reach misrepresentations occurring in proceedings held after the termination of the employment relationship. Petitioner is seeking the creation of an "after-occurring" evidence rule which would transform antidiscrimination statutes into laws sanctioning misconduct during adjudicative procedings. Last Term, in *St. Mary's Honor Center v. Hicks,* —— U.S. ——, 113 S.Ct. 2742, 2754 (1993), this Court rejected a similar argument: "Title VII is not a cause of action for perjury; we have other civil and criminal remedies for that." There is no reasoned basis for distinguishing this aspect of *Hicks* from Petitioner's Title VII argument. If under *Hicks* an employer does not lose a Title VII suit simply because it lied, neither should a victim of discrimination lose her Title VII action for the same infraction.

Petitioner's argument is in fact more extreme than the situation presented in *Hicks. Hicks* held that the finder of fact in a fair employment case was permitted—but not required—to draw the inference of unlawful discrimination from proof that the employer's proffered explanation of its action "was not believable." *Id.* at 2751. Indeed, the employer's proffer of a false "nondiscriminatory explanation" is a threat far more serious to the integrity of the fact-finding process than the kind of employee falsehood at issue herein: the false explanation in *Hicks* went to the very question of the employer's intent to discriminate, and proof of its falsity left the employer without any proffered "nondiscriminatory explanation," whereas the employee's untruth here pertained only to one of a host of subsidiary contextual issues.

The Court also noted that a "judgment for lying" rule was not a "fair and even-handed punishment for vice." *Id.* Again, the *Hicks* rationale militates against the bright line rule proposed by Petitioner. The record in this case discloses a failure to tell the truth by a number of witnesses before the administrative law judge—witnesses on *both* sides of the unfair labor practice dispute.

There is no doubt that Manso was an untrustworthy witness in one respect. The administrative law judge both credited Manso's testimony and on one point found him to be a liar. The same must be said of Petitioner's witnesses. The administrative law judge did not believe three of Petitioner's supervisory employees when they flatly denied making threatening statements to Manso soon after he returned to work in April 1989. The administrative law judge also rejected a fourth supervisor's assertions that union member Motter never complained of misdialing Manso's telephone number and never asked permission to redial Manso's number in May 1989.

The *amici* do not believe that there is any justification for lying under oath; nor do they suggest that significant employee misconduct should be condoned. The facts before the Court emphasize, however, the futility of creating a dispositive rule of decision based on a consideration —perjury—unrelated to the issues before a court. Every judge is faced with a mixture of truth and falsity as the evidence unfolds, but punishing lies unrelated to the employment relationship is not the purpose of a Title VII action—eradicating discrimination and providing relief to its victims are. As the Court in *Hicks* noted, lying to seek advantage in a court proceeding might have short term advantages, but "it also carries substantial risks, see Rules 11 and 56(g); 18 U.S.C. § 1621." *Hicks,* 113 S.Ct. at 2755. There is no reason to gut antidiscrimination laws simply to reinforce the existing rules against lying under oath. A bright line rule of the sort advocated by Petitioner would too often immunize intentional discrimination

and would prevent the trial court from weighing the appropriate factors in fashioning an appropriate remedy. Title VII does not support Petitioner's position.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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